

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 86/2019

SR 2/2019/JC

19/6/2019

In the matter between:

THE STATE

APPELLANT

and

MBUSO WILLIAM MOHLAPI

RESPONDENT

JUDGMENT

KUBUSHI J

[1] This is a special review application in terms of section 304A of of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act"), filed by the Additional Magistrate R. M. Motsogi for the district of Ekurhuleni South East held in Tsakane ("the magistrate").

[2] The relief in the review application is sought under the circumstances where the accused, Mbuso William Mohlapi, a 39 year old male person was erroneously convicted by the magistrate of two counts, namely, culpable homicide, and the contravention of section 63 (1) of the National Road Traffic Act, No 93 of 1996 (negligent driving).

[3] The two purported offences were actually one offence in that in the charge sheet the offences were pleaded in the alternative, that is, the accused was

charged with culpable homicide, *alliteratively*, the contravention of section 63 (1) of the National Road Traffic Act (negligent driving).

[4] The magistrate realised after the case was postponed for sentencing that there was an error in that the accused was convicted on the main count of culpable homicide and alternative count. As a result thereof, the matter was sent on review to this court, in order to correct the conviction. The accused is said to have been legally represented during the proceedings.

[5] The matter was referred to me as the reviewing judge for adjudication. I, in turn, referred the matter to the office of the National Director of Public Prosecutions ("NDPP") for input and comment. In the response from the office of the NDPP, it is recommended that the conviction of the accused on the main count of culpable homicide be confirmed. The conviction on the alternative count of contravening the provisions of section 63 (1) of the Road Traffic Act (negligent driving) be set aside; and the matter be referred back to the magistrate for purpose of sentencing. I am in agreement with the reasoning by the NDPP as to such recommendation and that an order in that regard should be granted.

[6] Section 83 of the Criminal Procedure Act allows for the accused to be charged in the alternative with the commission of any number of offences. The accused in this matter was charged with culpable homicide as the main count and contravening the provisions of section 63 (1) of the National Traffic Act (reckless/negligent driving) as the alternative charge. Naturally, the intention of the State, where there is an alternative count, is to request a conviction on one of the counts, that is, the main count or the alternative count, and not on both.

[7] It is trite law, and accepted practice, that a charge of contravening the provisions of section 63 (1) of the National Traffic Act is normally put as an alternative to the charge of culpable homicide. If the accused is convicted on both counts, as is the case *in casu*, can it be said that such a conviction is a duplication of convictions?

[8] Firstly, both convictions, in this matter, arise from the same facts. Secondly, in the case of culpable homicide the State must, *inter alia*, prove beyond reasonable doubt that the accused drove negligently and that it is as a result of such negligence that the death of the deceased followed. In negligent

driving, the State must still, *inter alia*, prove, beyond reasonable doubt, that the accused drove the motor vehicle negligently under the circumstances.

[9] Thus, the application of the evidence test to the circumstances pertaining in this matter establishes that the elements of the two offences do not differ. I am, therefore, convinced that the conviction on the alternative count should be squashed.

[10] In the circumstances, I make the following order:

1. The conviction of the accused on the main count of culpable homicide is confirmed;
2. The conviction of the accused on the alternative count of contravening section 63 (1) of the National Traffic Act No. 93 of 1996 (negligent driving) is set aside; and
3. The matter is referred back to the magistrate for the district of Ekurhuleni South East held at Tsakane for purposes of sentencing.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA